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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LEEDE EXPLORATION, LEEDE EXPLORATION, LTD., EDWARD H. LEEDE, JOHN G. LEEDE, KEVIN LEEDE, MICHAEL H. LEEDE, MARGARET ANNE LEEDE, KEVIN LEEDE, TRUSTEE FOR THE KATHLEEN QUINLAN LEEDE TRUST, AND KEVIN LEEDE, TRUSTEE FOR THE PETER GERARD LEEDE TRUST,
Petitioners,

V.

NICOR EXPLORATION COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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QUESTIONS PRESENTED

1. Did the lower courts' construction of a contractual indemnity clause for the first time at the appellate level constitute a violation of procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution because the Petitioners were denied notice and a hearing at trial?

2. When inextricably interwoven contract and tort claims are pleaded in the alternative, does a remand for the trial of the contract claim accompanied by an affirmance of a jury award on the tort claim, violate the guarantee of fundamental fairness expressed in the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES

The parties to the proceedings in the Oklahoma Supreme Court initially consisted of Petitioners, who are named in the caption, and NICOR Exploration Company. Petitioners are not corporations. Prior to the decision of the Oklahoma Court of Appeals, NICOR Exploration Company became SCANA Petroleum Resources, Inc. as a result of a purchase by SCANA Petroleum Resources, Inc. of all of the stock of NICOR Exploration Company and an ensuing corporate name change and merger. NICOR Oil & Gas Corporation was the former stockholder of NICOR Exploration Company and is a wholly owned subsidiary of NICOR, Inc. NICOR Oil & Gas Corporation stands in the capacity of assignee of the claims of the original Plaintiff entity, NICOR Exploration Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
I. The Appellate Courts' Determination to Award Attorney's Fees to Nicor as a Result of Construing a Contract Claim Not Raised Before the Trier of Fact Constitutes a Denial to Leede of Due Process of Law in Contravention of the Fourteenth Amendment to the United States Constitution	7
II. The Decision to Remand for a New Trial Solely Nicor's Tort Claims, Which are Inextricably Interwoven with Nicor's Contract Claims Not Remanded, Violates the Due Process Clause and Conflicts with Prior Decisions of This Court	10
CONCLUSION	18
APPENDIX A –	
Opinion of the Oklahoma Court of Appeals, Division I, entered December 21, 1993	1a

Page

APPENDIX B –

Order of the Oklahoma Supreme Court on attorney's fees and staying enforcement of mandate entered June 27, 1994 ..... 1b

APPENDIX C –

Order of the Oklahoma Court of Appeals, Division I, denying rehearing entered March 15, 1994 ..... 1c

APPENDIX D –

Order of the Oklahoma Supreme Court denying certiorari, entered May 17, 1994 ..... 1d

TABLE OF AUTHORITIES

CASES:	Page
American Locomotive Co. v. Harris, 239 F. 234 (1st Cir. 1917)	12
Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974) (Rehnquist, J.), *reh. denied*, 417 U.S. 977, 94 S. Ct. 3187, 41 L. Ed. 2d 1148 (1974)	8
Bassett v. O'Dell, 30 Colo. App. 215, 491 P.2d 604 (1971), *aff'd*, 178 Colo. 425, 498 P.2d 1134 (1972)	14
Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961)	16
Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985), *cert denied*, 478 U.S. 1021, 106 S. Ct. 3335, 92 L. Ed. 2d. 740 (1986)	11
Eck v. Powermatic Houdaille, Div. of Houdaille Industries, Inc., 364 Pa. Super. 178, 527 A.2d 1012 (1987)	14
Fay v. New York, 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947), *reh. denied*, 332 U.S. 784, 68 S. Ct. 27, 92 L. Ed. 367 (1947)	8
Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188 (1931)	5, 12
General Motors Truck Co. v. Shepard Co., 47 R.I. 153, 130 A. 593 (1925)	12
Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)	17
Gomez v. Volkswagen of America, Inc., 169 Cal. App. 3d 921, 215 Cal. Rptr. 507 (2d Dist. 1985)	13

Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983) 8

Hooper Associates, Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 548 N.E.2d 903 (1989) 10

In re: Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887 (N.D. Cal. 1981), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171, 103 S. Ct. 817, 74 L. Ed. 2d 1015 (1983) 11

Le Febvre's Administrator v. Central Vermont Ry. Co., 97 Vt. 342, 123 A. 211 (1924) 12

Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 79 S. Ct. 1184, 3 L. Ed. 2d 1224 (1959) 5, 12

Mason v. Texaco, 948 F.2d 1546, (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941, 118 L. Ed. 2d 547 (1992) 13

Mathews v. Eldredge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) 16

McBride v. Huckins, 76 N.H. 206, 81 A. 528 (1911) 12

McCracken v. City of Lawton, 648 P.2d 18, (Okla. 1982) 7

McGuire v. Russell Miller, Inc., 1 F.3d 1306, (2d Cir. 1993) 7

Mesimer v. Stancil, 45 N.C. App. 533, 263 S.E.2d 32 (1980) 14

Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) 16

Niles v. Evitts, 16 Conn. App. 696, 548 A.2d 1352 (1988) 14

Norfolk Southern R. Co. v. Ferebee, 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303 (1915) 12

Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983) 8

Peabody Galion Corp. v. Kropp, 658 P.2d 1155, (Okla. 1983) 7

Purdy v. Chambers, 128 Okla. 118, 261 P. 216, (1927) 17

Simler v. Conner, 372 U.S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963) 7

Simmons v. Fish, 210 Mass. 563, 97 N.E. 102 (1912) 12

White v. American Law Book Co., 106 Okla. 166, 233 P. 426 (1924) 7

Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) 9

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. amend. XIV, § 1 2

15 Okla. Stat. § 427(4) 10

15 Okla. Stat. § 427(6) 10

28 U.S.C. § 1257(3) 2

OTHER SOURCES:

Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975) 9

G. Gilmore, *The Death of Contract* (1974) 11

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NICOR EXPLORATION COMPANY ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

Leede Exploration, *et al.* ("Leede") respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Supreme Court in this case.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Appeals, Division I, is unreported. It is reprinted in the Appendix hereto, App. A.; the Order of the Oklahoma Court of Appeals, Division I, denying rehearing, is unreported, as are the orders of the Oklahoma Supreme Court. They are reprinted in the Appendix hereto, App. B, C, and D.

JURISDICTION

The judgment of the Oklahoma Court of Appeals, Division I, was entered on December 21, 1993. Petitioners timely requested rehearing, which was denied on March 15, 1994. Petitioners timely filed a petition for certiorari with the Oklahoma Supreme Court, which was denied on May 17, 1994. The judgment of the Oklahoma Supreme Court, granting in part Respondent's motion for appeal-related attorney's fees, was entered on June 27, 1994. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, § 1, to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

In 1984, Petitioners Leede and Respondent ("Nicor") entered into a contract, the Development Agreement, consisting of over 200 pages. Leede agreed to engage Nicor's sister company as drilling contractor to drill development wells in Beckham County, Oklahoma and Nicor agreed to guarantee a bank loan made to Leede to cover drilling charges. The bank loan was to be repaid from Leede's pledged production from existing and development wells. Leede successfully drilled and completed three development wells and repaid the bank loan.

In the Development Agreement, Leede agreed to assign Nicor an after-payout interest of four percent of Leede's interest in development wells covered by the Agreement. Until payout, as defined in the parties' Agreement, Nicor had no right to receive production from the wells or proceeds from the production, nor did it have any obligation to pay well costs. The Development Agreement expressly required Leede to "diligently market all production" from existing and development wells "as a reasonably prudent operator." In 1985, Leede concluded a settlement of disputes with the gas purchaser of the properties' production, El Paso Natural Gas Company ("El Paso"). Nicor claimed that, as to its after-Payout interests under the Development Agreement, Leede's actions in entering into the settlement agreement constituted a tort.

Nicor brought suit against Leede seeking actual damages for breach of contract and, in the alternative, actual and punitive damages for breach of fiduciary duty and tortious interference with the El Paso contract. Nicor contended that Payout occurred in November, 1986 and Leede contended that Payout occurred in August, 1990. As is evident from the pleadings and pre-trial conference order, Nicor's tort claims were based on identical allegations upon which Nicor based its breach of contract claims. Prior to trial, the trial court granted summary judgment to Leede on Nicor's tort claims, finding that such claims arose solely from the parties' contract and that Nicor's remedy was for breach of contract, not tort.

At trial in September, 1991, Nicor sought over $5.6 million in actual damages. Nicor specified an exact amount of damages it sought for each of various, alleged breaches of the contract. The jury returned a general verdict, without specific findings, awarding Nicor $811,848.50. After trial, Nicor applied to the

trial court for recovery of attorney's fees and costs aggregating in excess of $1,000,000.00. It was not until after trial that Nicor first asserted that it was entitled to attorney's fees under the indemnity clause of the Development Agreement. Nicor's request was denied by the trial court. Nicor subsequently appealed the trial court's summary judgment denial of its tort claims and its denial of Nicor's application for attorney's fees and costs. Nicor contended that the provisions of the parties' contract regarding indemnity should be construed as a fee-shifting attorney fee clause. Leede filed a cross-appeal in which Leede sought reversal of the verdict as not supportable by the evidence adduced by Nicor at trial.

On December 21, 1993, the Oklahoma Court of Appeals, Division I, issued its Memorandum Opinion in which it: 1) affirmed the jury verdict on Nicor's contract claims; 2) affirmed awards of monetary sanctions against Nicor; 3) reversed the dismissal of Nicor's tort claims and remanded only the tort claims for a new trial; and 4) reversed the trial court's order denying attorney's fees and costs. Leede filed a petition for rehearing in the Oklahoma Court of Appeals, Division I, which was denied. Leede then filed a petition for certiorari in the Oklahoma Supreme Court, which declined to grant certiorari by a 6-3 vote.

The appellate courts' determinations resulted in a violation of due process guaranteed to Leede by the Fourteenth Amendment to the United States Constitution. First, the appellate court awarded attorney's fees to Nicor based on an indemnity claim – a claim which was never raised as a damage claim or cause of action in the trial of the case and was wholly inapplicable for purposes of a post-trial application for attorney's fees. The only appropriate action that would have given Leede notice and an opportunity to present evidence would have been a remand for trial

of the issue of whether the indemnity clause of the contract entitled Nicor to attorney's fees. Second, the appellate court upheld the prior general jury verdict on breach of contract claims while remanding Nicor's interwoven tort claims, which were based on the same facts and the same Agreement between the parties, for a separate new trial.

Leede asserted in its Petition for Rehearing that a new trial on all claims was required because the facts and issues pertaining to the tort claims and breach of contract claims involve subject matter covered by the parties' contract and are inextricably interwoven. Leede stated at pages 15-16 of its Brief in Support of its Petition for Rehearing that pursuant to the decisions of the United States Supreme Court, "a new trial may be granted only if it clearly appears that the issues to be tried are entirely distinct from the other issues involved in the case and that a partial retrial can be had without injustice to any party. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188 (1931); *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 279, 79 S. Ct. 1184, 3 L. Ed. 2d 1224 (1959)." Following denial of its petition for rehearing, Leede filed a petition for certiorari with the Oklahoma Supreme Court in which Leede stated at pages 1-2: "The Court of Appeals' decision to remand for trial solely Nicor's claims for actual and punitive damages on its purported tort claims is contrary to decisions of . . . the United States Supreme Court, holding that a case must be remanded for a new trial on all issues where the facts and issues relating to the claims are inextricably intertwined." Leede further drew the attention of the Oklahoma Supreme Court to the issue of fundamental fairness at stake by quoting this Court's language on this point. Leede's Reply to Answer to Petition for Certiorari at pp. 3, 5.

As noted above, Leede's petition for certiorari was denied. Subsequently, Nicor made application to the Oklahoma Supreme Court for its attorney's fees relating to the appeal. Leede raised a due process objection in its response to Nicor's application. Leede stated in its response: "The Court of Appeals' determination to award attorneys' fees to NICOR in relation to a contractual indemnity claim, which should have been raised as a cause of action for indemnity, constitutes a denial to Leede of due process of law in contravention of the Fourteenth Amendment to the United States Constitution. NICOR's claim for appellate attorneys' fees is based on the same indemnity clause of the contract and the granting of NICOR's application for appeal-related attorneys' fees and costs would likewise constitute a denial to Leede of due process of law in contravention of the Fourteenth Amendment to the United States Constitution." Leede's Response Objecting to Appellant's Application for Attorneys' Fees and Costs at pp. 2-3. Subsequently, the Oklahoma Supreme Court issued its order granting an award of an appeal-related attorney's fee.

REASONS FOR GRANTING THE PETITION

This case raises two important and recurring questions of procedural due process, both of which are of increasing incidence. On each of these issues, the court below reached a conclusion in direct conflict with the customary judicial process. Each question is independently presented, and thus this case offers a suitable occasion for the Court to address these issues.

I. The Appellate Courts' Determination to Award Attorney's Fees to Nicor as a Result of Construing a Contract Claim Not Raised Before the Trier of Fact Constitutes a Denial to Leede of Due Process of Law in Contravention of the Fourteenth Amendment to the United States Constitution.

Oklahoma practice follows the "American Rule" in which each party bears its own attorney's fees in the absence of a statute authorizing such fees. *See McCracken v. City of Lawton,* 648 P.2d 18, 20 (Okla. 1982). The parties may, however, agree by contract to permit recovery of attorney's fees if the contractual provision is valid and applicable under Oklahoma Law. *Peabody Galion Corp. v. Kropp,* 658 P.2d 1155, 1157 (Okla. 1983). When a contract is alleged to provide for attorney's fees and such entitlement is disputed, a jury must decide at trial whether a party may recover such fees pursuant to the contractual provision. *See White v. American Law Book Co.,* 106 Okla. 166, 233 P. 426 (1924). This also accords with federal practice. *See Simler v. Conner,* 372 U.S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963), in which this Court held that the issue of a contingent fee retainer contract must be submitted to a jury. In the present case, Nicor claimed a right to attorney's fees based on an indemnity provision contained in the Development Agreement, the contract that was the basis for the lawsuit. The most recent court to address this question held that the issue of contractual liability for attorney's fees under an indemnity clause "was a claim for a contractual 'legal right' " and accordingly had to be tried by a jury. *McGuire v. Russell Miller, Inc.,* 1 F.3d 1306, 1315 (2d Cir. 1993).

Leede's protected interest, for the purposes of the Fourteenth Amendment, is the state-created right to a jury's construction of the contractual provision at issue. Oklahoma need not create this right;

the due process clause of the Fourteenth Amendment does not apply the Seventh Amendment to the states. *Fay v. New York,* 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947), *reh. denied,* 332 U.S. 784, 68 S. Ct. 27, 92 L. Ed. 367 (1947). Once, however, the state creates a protected interest, it cannot deprive a person of that interest absent appropriate notice and hearing. *Arnett v. Kennedy,* 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974) (Rehnquist, J.), *reh. denied,* 417 U.S. 977, 94 S. Ct. 3187, 41 L. Ed. 2d 1148 (1974). Purely procedural rules will not create due process rights, *see Olim v. Wakinekona,* 461 U.S. 238, 248-51, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983), but rules that substantively limit a decision maker's discretion will. *See Hewitt v. Helms,* 459 U.S. 460, 47172, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

In this case, Leede was not given notice that the indemnity provision of the contract would be construed *after* the jury's verdict, and was denied the hearing that Oklahoma deems appropriate to such a matter when the issue was raised for the first time *after* the jury trial. The jury in the present case had been charged with construing the parties' contract with regard to all claims for breach of contract and the enforcement of contract provisions asserted by Nicor. Jury Instruction Nos. 7, and 9 through 13. Nicor at no time prior to or during the trial, however, asserted Leede's indemnity liability as a cause of action. The jury was never asked to address a claim relating to the indemnity provisions of the contract, and no indemnity cause of action or a claim was alleged by Nicor at trial. Thus, Leede was never given an opportunity to present its argument to the trier of fact regarding the applicability of the indemnity provision. As a consequence, Leede was effectively denied the notice and hearing that Oklahoma specifies. If Oklahoma wishes to deny Leede a jury construction of the contract provision at issue, it must inform

Leede of this before the deprivation, so as to permit Leede to challenge this deprivation in advance of the jury trial. Otherwise Leede may find itself called upon to perform obligations arising from inconsistent constructions of the contract, as in fact occurred here. Procedural due process entitles persons "to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell,* 418 U.S. 539, 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

Leede first learned of the matter when Nicor relied on the indemnity provision to recover attorney's fees in a post-trial motion for fees greater than the total amount it recovered at the jury trial on all other contract claims. The trial court denied Nicor's application. Subsequently, the Court of Appeals arbitrarily granted attorney's fees to Nicor under the contract indemnity clause. This denied to Leede those elements of a hearing – the right to call witnesses, to introduce evidence, and to require that a jury decide the construction of the entire contract on the basis of such evidence – required by due process when the state ostensibly provides a jury trial. *See* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1279-95 (1975). The Court of Appeals' ruling was confirmed by the Oklahoma Supreme Court, which denied Leede's claim that granting Nicor's application for attorney's fees would constitute a denial to Leede of due process of law "in contravention of the Fourteenth Amendment to the United States Constitution." Leede's Response Objecting to Appellant's Application for Attorney's Fees and Costs, pp. 2, 3.[1]

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[1] Leede also informed the Oklahoma Supreme Court that it intended to raise the due process issues addressed herein in its Motion to Stay Issuance of Mandate filed with the Oklahoma Supreme Court. The Oklahoma Supreme Court entered an order that the mandate would issue, but that its enforcement would be stayed during the pendency of the instant proceeding.

Nicor never asserted indemnity liability of Leede as a cause of action in this case because Nicor had incurred no third-party claim as a result of any act of Leede. Leede defended this case under the presumption that the general rule in Oklahoma would apply, which is that attorney's fees are incidents of litigation and a prevailing party may not collect them from the losing party unless such an award is expressly provided for by statute or by agreement between the parties. The fact that a standard indemnity clause such as that involved in the present case is not a fee-shifting attorney fee clause, but rather is applicable only where claims of third persons are involved, is assumed in the Oklahoma statutory rules for interpreting an indemnity contract. Those rules include a requirement that the person indemnifying defend the person indemnified upon request and provide that reasonable notification of actions and an opportunity to control the defense are conditions of conclusive indemnity liability. 15 Okla. Stat. §§ 427(4) and (6). See also *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 548 N.E.2d 903 (1989), a well-reasoned, unanimous decision of the New York Court of Appeals in which the Court held that a contractual indemnity provision identical to the clause construed by the Oklahoma Court of Appeals is not a fee-shifting attorney fee clause, but rather applies only where liability to third parties has been incurred and a claim for indemnity is made.

II. The Decision to Remand for a New Trial Solely Nicor's Tort Claims, Which are Inextricably Interwoven with Nicor's Contract Claims Not Remanded, Violates the Due Process Clause and Conflicts with Prior Decisions of This Court.

The great contracts scholar Grant Gilmore presciently observed twenty years ago that,

> We are fast approaching the point [where] there is really no longer any viable distinction between liability in contract and liability in tort. We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.

G. Gilmore, *The Death of Contract* at 88 (1974).

One consequence of this development is the danger of double recovery. Where tort claims are based on the same facts as claims for damages for breach of contract, there is the possibility that a plaintiff may recover both even though it has suffered only one injury. It has been widely recognized that this would be a violation of due process. In an often quoted passage, the court in the *"Dalkon Shield"* case wrote, "a defendant in a civil action has a right to be protected against double recoveries not because they violate 'double jeopardy' but simply because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process. . ." *In re: Northern District of California "Dalkon Shield" IUD Products Liability Litigation,* 526 F. Supp. 887, 899 (N.D. Cal. 1981), *rev'd on other grounds,* 693 F.2d 847 (9th Cir. 1982), *cert. denied,* 459 U.S. 1171, 103 S. Ct. 817, 74 L. Ed. 2d 1015 (1983), *quoted in Cathey v. Johns-Manville Sales Corp.,* 776 F.2d 1565, 1571 (6th Cir. 1985), *cert. denied,* 478 U.S. 1021, 106 S. Ct. 3335, 92 L. Ed. 2d 740 (1986).

As irrefutably demonstrated by the pleadings, pre-trial conference order, and jury instructions, Nicor's tort claims were based on the same facts upon which Nicor relied to support its claims for actual damages for breach of contract. Leede's defenses to Nicor's tort claims would be the same as its defenses to Nicor's breach of contract claims, i.e., that Leede's

actions in relation to the gas contract settlement were undertaken pursuant to and in accordance with contractual authorization and contractual duty to take such actions. Thus, the decision to remand only the tort claims for a new trial, claims which are inextricably interwoven with the contract claims already tried by the jury, including the contract claim for indemnification, violates the due process clause of the Constitution and, as we shall see, also conflicts with decisions of this Court and of other state courts.

The Oklahoma Court of Appeals, by remanding only the tort claims for a new trial, disregarded decisions of this Court holding that a new trial as to less than all issues may be granted only if it clearly appears that the issues to be tried are entirely distinct from the other issues involved in the case and that a partial retrial can be had without injustice to any party. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S. Ct. 513, 75 L. Ed. 1188 (1931); *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 279, 79 S. Ct. 1184, 3 L. Ed. 2d 1224 (1959). *Gasoline Products* concludes,

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. *See Norfolk Southern R. Co. v. Ferebee*, 238 U.S. 269, 274, 35 S. Ct. 781, 59 L. Ed. 1303; *American Locomotive Co. v. Harris*, (C.C.A.) 239 F. 234, 240; *Simmons v. Fish, supra*, 210 Mass. page 568, 97 N.E. 102, Ann. Cas. 1912D, 588; *McBride v. Huckins*, 76 N.H. 206, 213, 81 A. 528; *General Motors Co. v. Shepard Co.*, 47 R.I. 153, 156, 130 A. 593; *Le Febvre's Administrator v. Central Vermont Ry. Co.*, 97 Vt. 342, 358, 123 A. 211. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncer-

> tainty, which would amount to a denial of a fair trial. *See Simmons v. Fish, supra.* There should be a new trial of all the issues. . . .

283 U.S. at 500-501.

This case is accurately understood as a due process case, rather than simply a Seventh Amendment case, as disclosed by the citations of its author, Justice Stone, and by the Court's reliance on matters of "injustice" rather than mere tradition. *See also Mason v. Texaco,* 948 F.2d 1546, 1552 (10th Cir. 1991), *cert. denied,* 112 S. Ct. 1941, 118 L. Ed. 2d 547 (1992).

The courts of other states have recognized the requirement of a single trial on interwoven claims or issues as being a fundamental requirement of justice and a fair trial. For example, in the California case of *Gomez v. Volkswagen of America, Inc.,* 169 Cal. App. 3d 921, 215 Cal. Rptr. 507 (2d Dist. 1985), the plaintiff recovered actual damages for strict liability, negligence, and breach of warranty. The plaintiff appealed only an order dismissing his fifth claim for breach of the covenant of good faith and fair dealing. The appellate court reversed the dismissal, but held that a new trial was required on all issues because the facts of the claims tried to the jury and the claims to be tried on remand were interwoven. The court stated:

> Appellant has appealed only from the trial court's adverse ruling on the fifth cause of action, not from the jury verdict on the other causes of action. . . However, mindful that there may be only a single judgment herein, *that the jury returned a general verdict without special findings,* and that the facts alleged in the fifth cause of action are so interwoven with those pleaded in the other causes of action that the determination regarding the fifth cause of action involved consideration of the facts underlying the others, in this case the entire judgment must be vacated and the entire case retried in order to achieve a just result.

Id. at 169 Cal. App. 3d 926, 215 Cal. Rptr. 510 (emphasis added).

In the North Carolina case of *Mesimer v. Stancil,* 45 N.C. App. 533, 263 S.E.2d 32, 33 (1980), the court held that a new trial was required on all issues even where the trial court erroneously dismissed a punitive damage claim. A Pennsylvania Court held in *Eck v. Powermatic Houdaille, Div. of Houdaille Industries, Inc.*, 364 Pa. Super. 178, 527 A.2d 1012, 1021 (1987), that where the issues are interwoven the appellant "should not be permitted to select for retrial the issues decided against him and, upon rehearing, treat those issues decided in his favor as settled."[2]

In the instant case, Nicor acknowledged in its responses to Leede's petition for rehearing and petition for certiorari filed with the state courts that its tort claims overlap with its breach of contract claims but suggested that injustice and a double recovery could be avoided because Nicor would elect between separate judgments on the same claims. Nicor cited no authorities in support of its contention because none exist.

The consequences of due process violations occasioned by a separate new trial of interwoven claims may include uncertainty of issue preclusion, inconsistent verdicts, and double recovery. These implications are amply demonstrated by a categorical statement made by Nicor that "the general jury verdict in favor of NICOR on NICOR's contract claims was a thorough rejection of Leede's version of the facts." Answer in Opposition to Appellees' Petition for Certiorari, p. 1. The jury, however, rejected more

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[2] *See also Bassett v. O'Dell,* 30 Colo. App. 215, 491 P.2d 604 (1971), *aff'd,* 178 Colo. 425, 498 P.2d 1134 (1972) (issues of damages and liability are so closely intertwined that it would be error to confine new trial solely to the liability issue); *Niles v. Evitts,* 16 Conn. App. 696, 548 A.2d 1352, 1354 (1988) (issues of damages and liability are inextricably interwoven so that a new trial solely on damages would be improper).

than 85% of Nicor's damage claims under the various categories of breach of contract claims it presented. No special findings were incorporated in the general jury verdict which might have substantiated which facts the jury accepted and which it rejected in determining Nicor's entitlement to less than 15% of its damage claims.

There are several crucial instances of the interwoven nature of issues arising under the contract and tort claims. For example, the term "Payout" is defined in the parties' contract. The date of occurrence of Payout under the contract (which Nicor contended was November, 1986 and Leede contended was August, 1990) affects not only Nicor's contract claim for proceeds due after Payout, but also its tort claim for unauthorized interference with gas contract relationships. Until Payout, Nicor had no right to gas sold to the gas purchaser or to receive proceeds therefrom and Leede had an express contractual duty to market gas as a reasonably prudent operator. Determination of when Payout occurred is inextricably tied to Nicor's tort claim of unauthorized interference with gas contracts, which Nicor alleged to have resulted from Leede's settlement with El Paso. That settlement was entered into before Payout, on December 5, 1985. Similarly, the terms and conditions set forth in the parties' contract must be evaluated in assessing the nature and scope of any purported fiduciary duty alleged to have been breached by Leede.

At the trial of Nicor's contract claims, Nicor sought alleged actual damages of $359,147.29 for Leede's December 5, 1985 settlement with El Paso. The previously dismissed tort claims, which were reinstated by the Oklahoma Court of Appeals, pertain solely to this same December 5, 1985 settlement entered into by Leede with El Paso in respect to which Nicor is deemed to have recovered its claimed actual damages of $359,147.29 under the general verdict.

A retrial of Nicor's tort claims would involve a trial of the same issues and facts involved in the trial of Leede's contract claims. The same witnesses, contract provisions, and other evidence would be presented at a new trial as in the prior trial. Leede would be compelled to produce the same witnesses and evidence produced in the prior trial in order to defend the same claims previously presented by Nicor as to which Nicor presented all actual damage claims under a different theory. Leede, however, would not have the same trier of fact evaluating the credibility of witnesses and testimony. The fact that the prior case was decided based on a general verdict without special findings of fact and that the contract and tort claims involve interwoven facts requires that, if a new trial is ordered, the entire judgment be vacated and the entire case retried in order to achieve a just result consistent with the requirements of due process. The overlap of claims is responsible for the fundamental injustice, potential for a double recovery and for inconsistent verdicts that would result from the separate trial of Nicor's tort claims.

In *Mathews v. Eldredge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Court held that " 'due process' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." 424 U.S. at 334, quoting *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). The Court also stated: "Due process is flexible and calls for such procedural protections as the particular situation demands." 424 U.S. at 335, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Accordingly, *Mathews* prescribed a test of three factors: (1) the private interest at stake; (2) the risk that existing

procedural safeguards cannot effect a cure; and (3) the governmental interest in avoiding these additional procedures. 424 U.S. at 335.

Applying the *Mathews* test to Oklahoma's bifurcation of contract and tort trials, it is clear that this state procedure deprives defendants such as Leede of property without due process of law. The private property stake is clearly significant. The fairness and reliability of splitting such trials has been repeatedly criticized. As in the instant case, such a splitting of trials cannot be remedied by post hoc judicial review. At most, such review can temper the second award; but on what factual grounds, since these will have been heard in a separate proceeding? Crucial to the second *Mathews* prong, the procedural infirmities here are easily remedied. The Oklahoma Supreme Court, in other cases, has already given its approval to the practice of remanding all claims for an entirely new trial where the claims of an untried pleading are inextricably interwoven with those on which the jury has spoken. *Purdy v. Chambers*, 128 Okla. 118, 261 P. 216, 220-221 (1927). The final *Mathews* factor asks whether the State has a legitimate interest in preserving its ruling that is so compelling as to render a reversal unduly burdensome. For example, this is often the case when procedural due process infirmities are claimed as a result of mass administrative action. This Court has effectively answered this question in a manner applicable to this case in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), when it wrote that "the States have no substantial interest in securing for plaintiffs. . . gratuitous awards of money damages far in excess of actual injury."

This Court should act to remedy this injustice. Sometimes civil procedures can, in extreme cases, so outrun rationality that they offend due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

CASE NUMBER 79,018

NICOR EXPLORATION COMPANY,
Appellant/Counter-Appellee,
versus
LEEDE EXPLORATION, LEEDE EXPLORATION LTD., EDWARD H. LEEDE, JOHN G. LEEDE, KEVIN LEEDE, MICHAEL H. LEEDE, MARGARET ANNE LEEDE, KEVIN LEEDE, TRUSTEE FOR THE KATHLEEN QUINLAN LEEDE TRUST, AND KEVIN LEEDE, TRUSTEE FOR THE PETER GERARD LEEDE TRUST,
Appellees/Counter-Appellants.

[Filed December 21, 1993]

APPEAL FROM THE DISTRICT COURT
OF BECKHAM COUNTY, OKLAHOMA
HONORABLE CHARLES L. GOODWIN, JUDGE

AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

R.K. Pezold, Kenneth J. Treece, Terry J. Barker, Joseph C. Woltz, Tulsa, Oklahoma, for Appellant/ Counter-Appellee.

H.B. Watson, Jr., Janis W. Preslar, Oklahoma City, Oklahoma, and Randal Kirk, Englewood, Colorado, for Appellees/Counter-Appellants.

MEMORANDUM OPINION

Opinion by CARL B. JONES, Judge:

In 1984, Appellant, Nicor Exploration Company, entered into a contract referred to as a Development

Agreement with Appellee, Leede Exploration, to assist Leede in the drilling of development wells in Beckham County. In 1988, Nicor sued Leede for breach of the Development Agreement and later added tort claims for breach of fiduciary duty and tortious interference with contract. Partial summary judgment was granted to Leede on Nicor's tort claims. A jury trial in September, 1991, resulted in a general verdict for Nicor in the amount of $811,848.50. Nicor appeals the dismissal of its tort claims and orders of the trial court compelling discovery and imposing sanctions. Nicor also appeals the trial court's refusal to award it attorney fees and costs. Leede counter-appeals, contending Nicor did not prove its damages, that the trial court erred in not specifically instructing the jury on parol evidence and that the trial court erroneously precluded evidence of gas balancing agreements.

Under the Development Agreement Nicor guaranteed a 9.5 million dollar bank loan to Leede. In return, among other things, Leede would enter into drilling contracts with Nicor and Leede would assign to Nicor 4% of its working interest in the development wells. Nicor's interest would not bear costs or receive proceeds until "payout" occurred. In addition, Nicor would be entitled to participate in additional development wells which Leede might drill in an "area of mutual interest" (AMI).

In support of its contract claims, Nicor alleged that Leede failed to make the assignments of working interests in the wells and failed to pay Nicor the proceeds of production as required by the Development Agreement. In addition, it was alleged that the AMI provisions were breached by Leede in selling the AMI acreage to Exxon without reserving Nicor's participation rights.

Nicor's tort claims were based on allegations that Leede entered into a "secret" deal with El Paso

Natural Gas Company, the pipeline purchaser of gas from the development wells. Nicor contends its interests in the wells were to be subject to the existing long-term, take-or-pay gas purchase contracts with El Paso. However, to settle take-or-pay disputes between Leede and El Paso, El Paso paid Leede millions of dollars in return for Leede's waiver of claims and termination of their high priced, take-or-pay contracts. The settlement had the effect of terminating Nicor's contract rights under the El Paso contracts. Nicor claims to have had no knowledge of the settlement agreement or even of any settlement negotiations.

NICOR'S APPEAL

Nicor's Tort Claims

At the hearing on Leede's Motion for Partial Summary Judgment as to Nicor's tort claims, the trial court dismissed those claims stating they were not relevant, not applicable and not permissible under the law. The trial court took this position because at least part of the actual damages sought under the tort claims were recoverable under the breach of contract claims; and, further, because the requested punitive damages are generally not recoverable in contract actions.

There is nothing in the law, however, that precludes such claims. In fact, 12 O.S. §2008 states that relief may be demanded in the alternative or of several different types. Independent, alternate or inconsistent theories may be fully litigated. *Howell v. James,* 818 P. 2d 444 (Okl. 1991). Both breach of fiduciary duty and tortious interference with contract are viable tort claims and can coexist with the breach of contract claims.

Facts were presented at the motion for summary judgment stage that support Nicor's theory that Leede, as the operator, had a fiduciary relationship

with Nicor. Nicor cites several cases in support of this proposition that operators have fiduciary responsibilities. E.g., *Young v. West Edmond Hunton Lime Unit*, 275 P.2d 304 (Okl. 1954). Leede raises the case of *Colpitt v. Skelly Oil Co.*, 499 P.2d 415 (Okl. 1972), which holds that an operator is not necessarily in the position of a fiduciary as where the parties' relationship is purely contractual, based on a written contract, complete as to detail, free from ambiguity, with no claim of fraud, overreaching or other illegality in the contract. Whether there was in fact a fiduciary relationship or a breach thereof is a fact question which is not properly resolved in a summary procedure and must be resolved by the trier of fact.

Likewise, Nicor's claim of tortious interference with contract was well pleaded and is a viable cause of action in Oklahoma. *Mac Adjustment Inc. v. Property Loss Research Bureau*, 595 P.2d 427 (Okl. 1979). This cause of action is based on Leede's alleged interference with Nicor's contractual relationship with El Paso Natural Gas Company. It is a tort independent of the breach of contract claims. There was no reason why it too should not have been litigated.

It was improper to dismiss Nicor's tort claims as a matter of law. It would likewise have been improper to grant the requested partial summary judgment as to either tort claim. It appears from Leede's Motion for Partial Summary Judgment and Nicor's Response that most of the material facts are in dispute. Because a substantial controversy exists as to the material facts presented, summary judgment is inappropriate. *Flanders v. Crane Co.*, 693 P.2d 602 (Okl. 1984).

Discovery Disputes

Nicor contends two orders of the trial court relating to discovery disputes were erroneous. The first (Leede's third motion to compel) concerned production of payment calculations by a Nicor accountant,

which Nicor claims are the attorney work product of its in-house counsel because they were allegedly performed at his direction. Nicor also contends the calculations had been turned over previously to Leede pursuant to an earlier order compelling their production. Leede contends these calculations were performed prior to Nicor's in-house attorney's employment with Nicor, and further, they had been provided to non-attorney employees of Nicor. Leede also denies having received the documents previously.

The second order alleged to be erroneously issued was the order compelling Nicor's in-house counsel, Mr. Garfield, to answer various deposition questions and granting sanctions against Nicor (Leede's sixth motion to compel). Leede served a notice of Deposition to Nicor for Mr. Garfield's deposition after other Nicor witnesses had identified Mr. Garfield as a person knowledgeable of facts pertaining to issues in the lawsuit. After receiving the notice, Nicor filed a motion for a protective order which apparently was either denied or not ruled upon until after the deposition.[1] At the deposition, numerous objections were made and the witness was instructed not to answer. Leede's Motion to Compel resulted. Nicor contends the information sought from Mr. Garfield was subject to the attorney-client privilege as his work product and, hence, not discoverable. The trial court disagreed.

Nicor does not identify any particular prejudicial effect caused by the Court's orders compelling discovery. Rather, Nicor seems to be more concerned with the fact that the trial court imposed sanctions at the same time the order to compel was issued. Court

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[1] Leede states the motion for protective order was denied. Nicor states the trial court refused to rule until after the deposition. Neither party cited to the record and this Court cannot determine from its review which is accurate.

orders compelling discovery are matters within the sound discretion of the trial court and we cannot say from the record before us the trial court abused its discretion. *Independent School Dist. No. 40 v. Sarkeys, Inc.*, 569 P.2d 1000 (Okl. 1977); *Okla. Gas & Elec. Co. v. Chez*, 527 P.2d 165 (Okl. 1974).

Regarding the sanctions, a review of the transcript and of Leede's motion for sanctions reveals that the sanctions sought, and apparently awarded, were those provided under 12 O.S. § 3227(A)(4).[2] These are merely the reasonable expenses, including attorney fees, incurred in obtaining the order. The trial court may not award such expenses if it finds the opposition to the motion to be "substantially justified." Apparently the trial court found no substantial justification for opposition to the motion. Again, we cannot say the trial court abused its discretion in this regard.

Attorney Fees and Costs

Nicor, as the prevailing party, sought to recover its attorney fees under the indemnity clause in the Development Agreement and under 12 O.S. §540. The indemnity clause, §16(c) of the Development Agreement provides in pertinent part:

> Except to the extent that the obligations of Leede Exploration to indemnify NICOR are expressly limited by specific provisions contained in Sections 5, 7, 9 and 11 hereof, Leede Exploration hereby agrees to indemnify, defend and hold harmless Nicor and each parent, subsidiary and affiliate of Nicor (collectively, the "NICOR Group") from and against all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, costs and expenses (including, without limitation, interest, penalties and reasonable attorneys' fees

[2] The Dollar amount of the sanction was not an issue on appeal and neither the record nor the briefs of the parties disclose the amount of the sanction.

> and expenses) resulting to, imposed upon or incurred by any member of the NICOR Group, directly or indirectly, by reason of or resulting from . . . (ii) a breach of any representation or warranty or covenant or agreement of Leede Exploration contained in or made pursuant to this Agreement, or any facts or circumstances constituting such a breach; . . . .

Leede argues this indemnity clause only pertains to third-party claims and not claims between the contracting parties. Leede argues the Development Agreement contains a specific attorney's fee provision precluding the recovery of attorney's fees and costs. Section 22 of the Development Agreement provides that:

> ". . . Nicor and Leede Exploration will each pay all of its own fees and expenses incident to the negotiations, preparation, execution and performance of this agreement, including the fees and expenses of its own counsel, accountants and other experts."

Nicor believes this attorney fees clause only applies to expenses occurred in drafting the Development Agreement and thus not to this action. Nicor further contends that §22 is not applicable because it is not one of the sections limiting the indemnity clause (§§ 5,7,9,&11). Section 22 distinctly speaks to *performance under the contract,* not expenses incurred by reason of a breach thereof. Section 16(c) specifically addresses Nicor's right to indemnification for "costs and expenses (including . . . reasonable attorneys fees and expenses) . . . incurred . . . by reason of . . . a breach of any . . . agreement of Leede . . . contained in . . . this Agreement." Leede argues this indemnity clause only pertains to third-party claims and not claims between the contracting parties. This interpretation is directly at odds with the express language of §16(c). Reading the contract in the manner suggested by Leede would result in rendering the language of section 16(c) a nullity. Title 15

O.S. 1991 § 157 requires contracts to be interpreted in a manner that gives effect to every part of the agreement if reasonably practicable. Therefore the proper reading of the agreement would reveal that § 22 speaks to costs involved in carrying out the contract and the indemnity clause, § 16(c) then refers to costs incurred by reason of a breach of the agreement. The trial court erred in not awarding a reasonable attorney fee and costs to Nicor as expressly provided in the contract executed by the parties.

LEEDE'S COUNTER APPEAL

Leede raises several propositions of error including: Nicor failed to prove its damages; the trial court should have granted Leede's Motion for Directed Verdict; the trial court should have given a requested jury instruction on parol evidence; and, the trial court erred in precluding evidence of gas balancing agreements.

Leede's first two propositions concern the sufficiency of the evidence as to Nicor's various damage claims. Primarily, Leede finds much dissatisfaction and disagreement with the testimony of Nicor's accounting expert witness. It is also urged that the trial court erred in not giving Leede's requested special verdict form rather than the general verdict form. The special verdict form would have damage awards made on a claim-by-claim basis.

Our review of the Court's instructions to the jury including the general verdict form, finds that the jury was adequately instructed concerning the issues in the case. Certainly the instructions contained no "miscarriage of justice" or "substantial violation of a constitutional or statutory right". 20 O.S. § 3001.1.

Several theories of recovery were submitted to the jury. The general jury verdict found in favor of Nicor on all such theories. That the amount of damages awarded coincided with those damages re-

quested under one theory is of no significance. It is impermissible conjecture to assume the verdict represented damages for one claim only and nothing for other claims. *Irwin v. SWO Acquisition Corp.*, 830 P.2d 587 (Okl. App. 1992). The Court cannot go behind the general verdict to determine how the jury calculated its award.

The general jury verdict constitutes a finding of every material fact necessary to support it and is conclusive as to all disputed facts in favor of the prevailing party. *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230 (Okl. 1989). Although the evidence of damages was, and is, hotly disputed, it is uniquely the function of the jury to weigh the evidence and determine the credibility of the witnesses. This Court will not reweigh the evidence. *Lloyd v. Campbell*, 254 P.2d 986 (Okl. 1953). Because there was competent evidence to support the jury's verdict, it will not now be disturbed. *Hames v. Anderson*, 571 P.2d 831 (Okl. 1977).

Leede next takes issue with the trial court's refusal to give a requested jury instruction which would have instructed the jury to consider parol evidence in construing the Development Agreement. This instruction was requested because the Development Agreement was allegedly ambiguous, making parol evidence admissible to determine the contracting parties' intent.

There is no contention that parol evidence was wrongly excluded at trial. Further, the jury was not instructed to disregard parol evidence. In fact, the instruction given told the jury to consider all the evidence. In no way does this alleged error meet the test of reversible error found in 20 O.S. §3001.1. Leede's briefs disclose no authority demonstrating the trial court erred in this matter. Where an appealing party does not support his contention with any authority, if an examination of the record discloses

that there is no prejudicial error, and that substantial justice has been done, the judgment will be affirmed without discussing the assignments in detail. *Sisney v. Smalley,* 690 P.2d 1048, 1051 (Okl. 1984).

Leede's final allegation of error is the trial court's refusal to let Leede introduce evidence of gas balancing. Leede believed Nicor's after-payout interest was subject to gas balancing agreements. Prior to trial, the trial court ruled that gas balancing had not been plead and that it would thus be improper to allow evidence of balancing as a defense to the damage claims of Nicor. Gas balancing was mentioned in Leede's Answer to the First Amended Petition, but only in the context as a defense to Nicor's fourth cause of action which was dismissed well before trial. A fair reading of Leede's Answer would not place Nicor on notice that gas balancing was an affirmative defense to anything other than the dismissed fourth cause of action. Furthermore, Nicor's Second Interrogatories to Leede asks for all facts supporting Leede's affirmative defenses. Neither Leede's responses nor later supplemental responses mention gas balancing. Defenses must be affirmatively plead. 12 O.S. 1991 §2008. Where they are not plead, they are waived. *RST Service Mfg., Inc., v. Musselwhite,* 628 P.2d 366 (Okl. 1981).

The trial court's orders compelling discovery and issuing sanctions are free from error. The dismissal of Nicor's tort claims is **reversed** and **remanded.** The jury verdict on Nicor's contract claims is **affirmed.** The trial court's orders denying attorney fees and costs to Nicor is **reversed.** The cause is **remanded** for further proceedings consistent with the views expressed in this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

HANSEN, C.J. AND ADAMS, J., CONCUR.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 79,018

NICOR EXPLORATION COMPANY,
Appellant and Counter-Appellee,

v.

LEEDE EXPLORATION, LEEDE EXPLORATION LTD.,
EDWARD H. LEEDE, ET AL.,
Appellees and Counter-Appellants.

[Filed June 27, 1994]

ORDER

Appellant's motion for an award of an appeal-related attorney's fee is granted in part and denied in part. After mandate, the trial court is authorized to determine the amount of appeal-related counsel fee to be awarded to the appellant, for the appellant's defense of the counter-appeal only, in an adversary hearing, after proper notice. Appellant is entitled to an attorney's fee for the successful defense of the counter-appeal, which sought reversal of the judgment in favor of appellant on appellant's breach of contract claims, because the Court of Appeals held that the contract between the parties allows for recovery of an attorney's fee to the prevailing party in actions for breach of the contract. *Shoup v. Mayerson*, 454 P.2d 666 (Okl. 1969). Appellant has cited no authority which would entitle it to an attorney's fee for appeal-related services in its successful quest for reinstatement of its tort claims. *Kay v. Venezuelan Sun Oil Co.*, 806 P.2d 648 (Okl. 1991); *Olansen v. Texaco, Inc.*, 587 P.2d 976 (Okl. 1978).

Appellant's application for costs is granted in part and denied in part. Appellant is entitled to

recovery of costs for the filing fee and the transcript in a total amount of $1,600.00. 12 O.S.1991 § 978. Appellant is not entitled to recover as costs on appeal expenses incurred in copying briefs, telephone calls, etc. *Sunrizon Homes v. American Guaranty Investment*, 782 P.2d 103 (Okl. 1988). The district court fee for preparation of the record is not recoverable in this Court.

Appellees' motion to stay issuance of mandate is denied. The mandate shall be issued but its enforcement stayed until a petition for certiorari is filed in the United States Supreme Court and for so long thereafter as certiorari proceedings are pending in that Court. Appellees are directed to file a report concerning the status of the certiorari proceedings in the United States Supreme Court not later than August 20, 1994.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 27TH DAY OF JUNE, 1994.

/s/ Robert E. Lavender

Vice Chief Justice

LAVENDER, V.C.J., SIMMS, SUMMERS, and WATT, JJ. - Concur

OPALA, J. - Concurs solely by the command of the settled-law-of-case-doctrine.

APPENDIX C

THE COURT OF APPEALS, DIVISION I,
STATE OF OKLAHOMA

[March 10, 1994]

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

73,478 - Public Service Company of Oklahoma, Appellant, v. The Corporation Commission of the State of Oklahoma, Kaiser-Francis Oil Company, Samson Resources Company, Continental Illinois National Bank, Administrator for the Federal Deposit Insurance Corporation, Petroleum Investments, Ltd., Robert L. Bolin, Conoco, Inc., CNG Producing Company, Mid-Continent Oil and Gas Association, The Oklahoma Independent Petroleum Association, MCM Energy, Inc., Merlin Oil Corporation, Kirkpatrick Oil and Gas Company, Fleischaker Family Partnership, Fennix Company, Fina Oil and Chemical Company, Forest Oil Corporation, Sylvia Golsen, and Zelda Brown, Appellees.

The Petition for Rehearing filed by Appellant is *DENIED.*

79,018 - Nicor Exploration Company, Appellant/ Counter-Appellee, v. Leede Exploration, et al., Appellees/Counter-Appellants.

The Petition for Rehearing filed by Appellees is *DENIED.*

81,150 - The Oklahoma Department of Health and Holdenville Nursing Homes, Inc., Appellees, v. Medi-Plex Nursing Centers, Inc., d/b/a Boyce Manor Nursing Home, Bob G.

Mitchell and Gilbert Green, Appellants.

The Petition for Rehearing filed by Appellants is *DENIED.*

80,879 - Fairfield Oil & Gas Corp., an Oklahoma Corporation, Plaintiff/Garnishor/Appellee, v. Bill Laird, an individual, d/b/a Bill Laird Oil, Defendant, and The Trust Company of Oklahoma, Oklahoma City, Trustee for Myers Dallas Campbell, MWC Energy Corp., Gary L. McGee, Mary Anne McGee, George W. Bailey and Ray Cleary, Third party Plaintiffs/Garnishors/Appellees, v. Mary Lou Start, et al., Third Party Defendants, and Kerr-McGee Refining Corp., Garnishee, and V. Florence Crabtree, Chris Dobbins, Bill Laird, A.L. Bragg, R.A., Inc., Eileen Corp., Ralph J. Cubbler, III, Intervenors/Appellants.

The Motion for Attorneys Fees filed by Appellants is *DENIED.*

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 10th day of March, 1994.

/s/ Carl B. Jones

CARL B. JONES, Presiding Judge

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

[Tuesday, May 17, 1994]

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

79,018 **Nicor Exploration Company v. Leede Exploration, Leede Exploration Ltd. et al.**
Certiorari denied.
CONCUR: Lavender, V.C.J., Simms, Hargrave, Wilson, Kauger, Watt, JJ.
DISSENT: Hodges, C.J., Opala, Summers, JJ.

79,403 (consolidated with 79,404) In the Matter of the Estate of Robert Moore, Deceased.
Ronald V. Collier, Attorney for Barbara Moore, Personal Representative of the Estate of Robert Moore, Deceased v. Evelyn Christine Svec, Administratrix of the Estate of Robert Anthony Moore, Deceased and Guardian of Robert Anthony Moore, II, a minor child.
Certiorari denied.
All Justices concur.

80,208 Local America Bank of Tulsa, F.S.B. v. Harold W. Burlingame and Barbara Jean Burlingame.
Certiorari denied.
All Justices concur.

80,491 Charles A. Salatka, Archbishop of the Catholic Archdiocese of Oklahoma City and City of Oklahoma City v. Rodney L. Goddard and other property owners and neighbors.
Certiorari denied.
CONCUR: Lavender, V.C.J., Hargrave, Opala, Kauger, Summers, Watt, JJ.
DISSENT: Hodges, C.J., Simms, Wilson, JJ.

80,495 Angela Rosson v. Dr. Thomas A. Coburn.
Both petitions for certiorari denied.
All Justices concur.

80,879 Fairfield Oil & Gas Corporation, an Oklahoma corporation v. V. Florence Crabtree, Chris Dobbins et al.
Certiorari denied.
CONCUR: Hodges, C.J., Lavender, V.C.J., Simms, Wilson, Summers, Watt, JJ.
DISSENT: Hargrave, Opala, Kauger, JJ.

82,592 Donald F. Rittman v. State of Oklahoma ex rel. Department of Public Safety.
Certiorari denied.
All Justices concur.

83,180 American Natural Energy Corporation, Michael K. Paulk and R. A. Bruce McDonald v. The Honorable Ronald L. Shaffer, Judge of the District Court for Tulsa County.
Application to assume original jurisdiction is denied; request for attorney's fee is denied.

83,275 Sherwood Construction Company of Oklahoma, Inc. (now Sherwood South, Inc.) v. The Honorable David L. Peterson, District Judge for the Oklahoma District Court in and for Tulsa County.
Application to assume original jurisdiction is denied.
CONCUR: Hodges, C.J., Lavender, V.C.J., Hargrave, Opala, Wilson, Kauger, Summers, Watt, JJ.
NOT PARTICIPATING: Simms, J.

/s/ Ralph B. Hodges

CHIEF JUSTICE